United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-1204

To be argued by
EDWARD THOMPSON, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1204

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS JAMES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Thomas James appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*), entered on May 16, 1975, which judgment convicted appellant, after a jury trial,[1] on a single count of knowingly possessing with the intent to distribute approximately twenty grams of heroin hydrochloride in violation of Title 21, United States Code Section 841(a)(1). On May 16, 1975, appellant was sentenced to a term of seven years imprisonment and a special parole term of five years. Appellant is presently free on bail pending appeal.

On this appeal, although conceding the sufficiency of the evidence against him, appellant claims that the District Court failed to preserve an atmosphere of impartiality thereby denying him a fair trial.

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[1] A verdict of guilty was returned by the jury on April 3, 1975 after four days of trial; a prior trial of appellant commenced on February 4, 1975 but ended in a mistrial on February 5, 1975.

Statement of Facts

A. The Government's Case

Investigator George McCoullum, the government's main witness, purchased twenty grams of heroin directly from appellant Thomas James. This purchase took place on August 24, 1971 in Bruno's Tavern in Jamaica, Queens.

George McCoullum testified that he was an investigator for the New York State Police for about 13 years but that in August, 1971 he performed investigative duties with the Federal Bureau of Narcotics and Dangerous Drugs in Westbury, New York (T. 26).[2] On August 24, 1971, the day in question, McCoullum's supervisor, Special Agent Lawrence P. McElynn, introduced him to Moses Roper ("Moe"), an informant, and Maureen DePace, Moe's girlfriend. Agent McElynn instructed McCoullum that he would be taken by Moe to the Jamaica area of Queens (T. 27).[3] Prior to leaving the Westbury office, McCoullum searched Moe for weapons and contraband (T. 28, 29, 164). In addition he checked the car to be used for the trip for any identifiable police markings (T. 28-29).

The trio arrived in Jamaica and stopped at Bruno's Tavern located on the corner of South Road and New York Boulevard, in mid-afternoon. Moe and McCoullum looked

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[2] Numerical references with the prefix "T." are to the pages of the transcript of the trial.

[3] McCoullum testified that he was assigned to this investigation specifically because he was black (T. 48) and that he was to be guided by Moe to several bars in the Jamaica area of Queens in order to make an undercover purchase of narcotics from a known dealer (T. 48, 51, 52, 54). McCoullum was prepared to pay for any narcotics purchased with $1,200, in prerecorded Government funds which had been furnished by Agent McElynn (T. 33, 34). Agent McElynn, the case agent, testified that these efforts were in furtherance of an investigation of narcotics distribution rings in the area (T. 161, 162, 181).

in vain for a prospective contact (T. 30). McCoullum and Moe departed Bruno's leaving Maureen behind, and the two went to other neighborhood bars in further attempts to locate a narcotics contact (T. 30).

McCoullum and Moe returned to Bruno's Tavern at approximately 7 or 8:00 P.M. that evening (T. 31). After parking the car, McCoullum and Moe observed eight or nine people all of whom were black standing on the corner outside the bar engaged in conversation.[4] At this point, Moe called to appellant who was in the group (T. 31-32). When appellant came over, Moe introduced McCoullum as his cousin from Washington, D.C. and stated that McCoullum was interested in purchasing a half kilogram of heroin (T. 32).[5] McCoullum and appellant then engaged in a discussion during which McCoullum told appellant that he would like to buy an ounce of heroin to begin with and that if satisfied with the quality of this sample he would buy the entire half "key" of heroin (T. 32-33). Appellant assured Investigator McCoullum that he only dealt in "good stuff". After "bickering" over the price, the two agreed on $1,200 for the initial one ounce purchase. Appellant then told McCoullum to wait at Bruno's Tavern and that they would "conduct business" upon his return (T. 34).

McCoullum complied with appellant's instructions and entered the tavern, joining Maureen at the bar. After about an hour and a half, appellant returned, approached McCoullum and instructed McCoullum to follow him into the bar's restroom (T. 34-35). In the restroom McCoullum

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[4] Moe is also black.

[5] Appellant was introduced to McCoullum as "Tommy". No last name was used (T. 37).

Mc Coullum described "Tommy" as a black male, approximately 6'2" to 6'3" tall, slender build, wearing a process hairstyle, which is straightened hair worn raised in front by appellant, neatly attired in a blue and white polo shirt and brown slacks (T. 37-38).

exchanged the $1,200 in pre-recorded funds for a plastic bag containing white powder which appellant produced from his pocket (T. 36). After leaving the men's room, McCoullum made a telephone call to the base radio to advise the outside surveillance agents that he had received the narcotics and was departing. McCoullum rejoined Moe and Maureen at the bar (T. 37). McCoullum, Moe and Maureen then left the tavern and proceeded in their car to the parking lot of a restaurant in Rosedale where they met with Agent McElynn who had been part of the surveillance team located outside the tavern during the narcotics sale. A field test of the contents of the bag conducted by McElynn at the restaurant parking area revealed the substance to be an opium derivative (T. 39-40, 168-170). Upon McCoullum's and McElynn's return to the Westbury office that night, a second field test was conducted with the same result. The package was then sealed and the two agents signed the envelope (T. 40-41). At trial, defense counsel stipulated that the substance purchased by McCoullum that night and introduced into evidence (Government's Exhibit 12a) was in fact heroin hydrochloride (T. 42).

Investigator McCoullum returned to Bruno's Tavern several times during the week after the sale but was unable to locate appellant (T. 89-90). Thereafter, in the fall of 1971 photographs taken of the appellant were mailed by Agent McElynn to McCoullum who had been reassigned to upstate New York. McCoullum thereafter advised McElynn that the photos depicted the person he had purchased narcotics from in Bruno's Tavern on August 24, 1971 (T. 87, 153).[6]

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[6] From his vantage point McElynn had been unable to observe appellant at the time of the sale (T. 166-168). However, McElynn was photographed with appellant on September 7, 1971, while talking to appellant in the parking lot behind appellant's occasional residence. At this time appellant told McElynn that his last name was "James" (T. 184).

During cross-examination of McCoullum the trial court granted defense counsel's application to have appellant approach the witness and jury to exhibit appellant's face and height (T. 81). At trial, McCoullum was able to see one scar which was on the lower left side of appellant's chin (T. 82, 84).[7] McCoullum testified that he did not recall having noticed any scar the night of the sale (T. 84). There was no testimony at trial that, on August 24, 1971, appellant had either of the scars which he exhibited at trial over 3 years later.[8]

Maureen DePace testified that since 1968 she was living with Moses Roper and that on August 24, 1971 was herself a long time heroin addict with a $50 a day habit (T. 112, 121-122). Further, she testified that in the afternoon on that date she accompanied Moe and McCoullum to Bruno's Tavern (T. 114-115). Maureen remained behind and was present in the tavern that evening when Moe and McCoullum returned to the bar (T. 115). Maureen learned of their return when she heard Moe's voice coming from New York Boulevard outside the bar at about 7:00 P.M. She went to the door, saw Moe, and observed McCoullum talking to appellant. Upon hearing appellant mention something about money, she decided to return to her seat at the bar (T. 115-116). Maureen had visited Bruno's Tavern almost every day since 1969, and on practically each visit she had seen appellant, whom she knew as "Tommy" (T. 113, 119).

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[7] A description, for the record, of the marks on appellant's face during cross-examination, is the foundation for appellant's first instance of allegedly improper interference or comment by the trial court.

[8] In an attempt to establish that appellant had facial scars on August 24, 1971, defense counsel received subpoenaed photographs taken of appellant in 1968 from the Department of Corrections, but did not introduce them in evidence. According to counsel the pictures were "inconclusive" (T. 250-251).

After Moe and McCoullum rejoined her at the bar, Maureen saw appellant walk into the bar and she heard him tell Moe that "he didn't want to do anything because there were too many police outside" (T. 116, 127). McCoullum then gave her a dime, a phone number, and instructions to go to an outside phone to make a call (T. 116-117). Upon completion of the call she returned to her seat next to Moe and McCoullum at the back of the bar near the New York Boulevard entrance.

A few minutes later a girl entered the bar and seated herself next to appellant, who was then seated several seats away toward the front of the bar (T. 117). Appellant, McCoullum and Moe then walked together to the back of the bar toward the kitchen and restrooms. Thereafter, Maureen observed appellant return to the girl at the bar who handed him a plastic bag containing white powder (T. 118). After taking the package, appellant immediately walked back to McCoullum. Meanwhile Moe had returned to his seat at the bar next to Maureen (T. 131-132). Appellant and McCoullum then entered either the kitchen or restroom (T. 118).[9] A few minutes later McCoullum rejoined Maureen and Moe at the bar, and they left the bar together (T. 118).

The Government's last witness was Special Agent Lawrence P. McElynn of the Drug Enforcement Administration (T. 160). McElynn testified that on the night in question he was the case agent and in charge of the surveillance team (T. 167). McElynn saw an individual approach Moe and McCoullum and the three talking outside the tavern on New York Boulevard, McElynn was too far away and it was too dark for him to identify appellant (T. 167).

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[9] Maureen was steadfast in her testimony that Moe had not been a party to the transaction in the back of the bar. On cross-examination, counsel repeatedly hammered at this aspect of her testimony and when he held up three fingers, after the witness had said there were only two people in the back of the bar, Judge Bramwell admonished counsel for this possible misleading gesture. That admonishment has given rise to the second claim of alleged error by the trial judge.

B. The Defense Case

Moses Roper ("Moe"), the informant, called by the defense as a hostile witness, substantially supported the testimony of Investigator McCoullum and Maureen DePace. Moe further testified that during 1971 he derived his income from selling drugs (T. 223). And, during the period from 1970 to mid 1971 he was employed by Tommy James (T. 240). Although Moe could not recall ever having seen a scar on appellant's chin before, he explained that in 1970 appellant customarily wore a beard, and that in August, 1971, the time in question, appellant had "slight beard . . . enough to cover his chin" (T. 243).

No other witness was called by the defense.

ARGUMENT

The District Court did not prejudice appellant's right to a fair trial.

Appellant's sole argument on appeal is that on two separate occasions the trial judge made certain remarks which in the first instance constituted improper comment on the evidence, and in the second improper admonition of defense counsel. While conceding the sufficiency of the evidence against him, appellant contends that these two instances of interference by the trial court so undermined his case that it amounted to a failure to preserve an atmosphere of impartiality and thereby a denial of a fair trial.

It has long been recognized that a federal judge may comment on the evidence, *Quercia* v. *United States,* 289 U.S. 466 (1933); and further, that a trial judge as more than a "mere moderator" has the duty to exercise control over the conduct of the trial *United States* v. *Brandt,* 196 F.2d 653 (2d Cir. 1952). The only issue here is whether

the challenged comments were so unfair and unwarranted as to require reversal of appellant's conviction. In the Government's view, each of the remarks complained of by appellant was proper and appropriate. Moreover, the conduct of the trial as a whole was a model of impartiality and fairness.

(1)

The first comments to which appellant objects concerns the court's description for the record of scars appearing on appellant's face. The core of the Government's case against appellant was the testimony of Investigator McCoullum who unequivocally identified appellant as the person who sold him the heroin in Bruno's Tavern on the night of August 24, 1971. Appellant contends that his counsel's attempt to impeach that identification was undercut by Judge Bramwell's interference. That attempted impeachment focused on questioning of McCoullum as to whether he had noticed any marks or scars on appellant's face on the night of the sale. To facilitate this attack defense counsel requested that appellant be allowed to approach the witness and the jury to exhibit his height and permit a close view of his face. This application was granted. Counsel then posed a series of questions about appellant's facial scars without specifically describing for the record their precise location. Appellant claims that Judge Bramwell exceeded the bounds of proper comment when he described for the record the exact location and configuration of the scars to which counsel referred.[10]

As this Court has noted, the trial judge is "something more than a useless appendage to the trial . . . [h]e bears the responsibility of insuring that the facts in each case are presented to the jury in a clear and straightforward manner." *United States* v. *Nazzaro*, 472 F.2d 340, 313

[10] T. 81-82.

(2d Cir. 1973). Here, during cross-examination of the Government's first witness, counsel attempted to establish before the jury the fact that scars existed on appellant's face without offering any explanation whatsoever of their location or description. Immediately after the trial court's description of the scars for the record appellant pivoted to face the jury, and walked back and forth in front of the jury box. Thus, the finders of fact were immediately afforded the opportunity to draw their own conclusion on the appearance of the scars. One can only speculate why counsel chose to present this evidence in such an incomplete and ambiguous manner, but it is clear that upon so doing it became incumbent upon Judge Bramwell to make sure that the jury understood exactly which facial scars counsel had alluded to, and further that these references were accurately preserved in the printed record. Judge Bramwell did not intervene in an attempt to curtail counsel's cross-examination of the witness, nor did the judge describe these scars in an effort to telegraph to the jury his impression of the relative worth of this evidence. *Compare United States* v. *Nazzaro, supra,* and *United States* v. *Guglielmini,* 384 F.2d 602 (2d Cir. 1967). The trial court's comments were directed exclusively at the physical appearance of the scars for purposes of clarification of the record and assistance to the jury, not at the weight or the strength of appellant's case. *United States* v. *Boatner,* 478 F.2d 737, 740 (2d Cir.), *cert. denied,* 414 U.S. 848 (1973). Indeed, there is no claim that Judge Bramwell inaccurately described for the record appellant's facial scars. Further, Judge Bramwell's obvious purpose of assisting the jury is impressively displayed by his suggestion to defense counsel to "[t]urn around and let the jury see his face" (T. 83).

Thus, despite a total absence of proof that appellant had scars on his face on August 24, 1971, the trial court's description of facial scars exhibited by appellant at trial in April 1975, is argued to have undermined defense's

theory of mistaken identity. Indeed, the identity of the person who sold the heroin to Investigator McCoullum was never in doubt. Three witnesses, one of whom was defense's only witness, unequivocally identified appellant Tommy James as the sellor of the heroin. Appellant's so-called defense should be viewed, therefore, in the foregoing light.

(2)

Appellant's second challenge to the conduct of the trial judge concerns the judge's comment to counsel during the cross-examination of the Government witness, Maureen DePace.

Defense counsel repeatedly asked the witness about the number of people who walked to the back of Bruno's Tavern moments before the actual sale took place in the men's room. Repeatedly Maureen answered these inquiries by stating that George [McCoullum] and the appellant entered the bathroom or kitchen at the rear of the bar (T. 132-133). Judge Bramwell interrupted this questioning and noted:

> The Court: Some instances you're misinterpreting because it's perfectly clear she's made it perfectly clear just how this thing happened. That's the second time she's gone over that story.
>
> But you hold up your fingers three when there is two. You make different gestures which are not consistent with what this woman is saying. But you go right ahead and have your cross-examination, go right ahead.

Counsel accepted the court's invitation and repeated the questions to the witness.[11]

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[11] The entire episode was as follows:

Q. Then you say Tommy got up and went to George and Moe? A. No. Moe was back by me at the time.

[Footnote continued on following page]

Counsel now argues without elaboration that Judge Bramwell's comment somehow destroyed the "atmosphere of impartiality" and thereby denied him a fair trial (Appel-

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Tommy just got the package he didn't even sit down. He got the package and he turned around again, walked back behind me, back to George and he went into the—I don't know if it was the kitchen or the bathroom.

Q. Three of them together? A. No. Moe was still by me.

Q. Who walked back towards the kitchen? A. Tommy.

Q. Tommy and who? A. Tommy by himself.

Q. Walked where? A. Back to George.

The Court: Some instances you're misinterpreting because it's perfectly clear she's made it perfectly clear just how this thing happened. That's the second time she's gone over that story.

But you hold up your fingers three when there is two. You make different gestures which are not consistent with what this woman is saying. But you go right ahead and have your cross-examination, go right ahead.

Mr. Quagliata: Judge, I believe I am honestly trying to get——

The Court: Counsel, I'll read the testimony to you if there is a problem. But I'm telling you it's not proper that way. But you go right ahead.

Q. There was, explain to me exactly what happened? A. From when?

Q. From when you see this girl pass the package to Tommy where the people are, what happened? A. Moe was standing by me, George was still waiting toward the back of the bar either by the kitchen door or bathroom door. I forget now. Tommy got the package from the girl standing around, walked behind me past me again back to George. Moe was standing by me and Moe wasn't with them.

Q. Okay. Do you remember seeing what happened between George and Tommy? A. They went in either the kitchen or a bathroom, I forget which one. I couldn't see that.

lant's Brief, page 7). In an attempt to add apparent substance to his claim, appellant cites this Court's attention to the extended colloquy between defense counsel and Judge Bramwell following defense counsel's motion for a mistrial (Appellant's Brief, page 15-22). Without noting that the colloquy took place outside the presence of the jury, appellant merely concludes "that the trial court was unimpressed with the defense" (Appellant's Brief, page 23). A simple reading of the record, including the colloquy between defense counsel and Judge Bramwell outside the presence of the jury, belies appellant's claim that he was denied a fair trial by the conduct of the trial judge. Defense counsel was neither reprimanded nor criticized in front of the jury. Judge Bramwell simply (and generously) noted that defense counsel had apparently "misinterpreted" the testimony of Maureen DePace when he raised three fingers in response to her repeated testimony that only two people ultimately proceeded to the rear of Bruno's Tavern.[12]

Most importantly, however, the trial record is absolutely barren of any indication that Judge Bramwell communicated to the jury that he personally believed that appellant was guilty. Indeed, it is quite obvious that Judge Bramwell was keenly sensitive to the need to display the impartiality of the court when he instructed the jury to disregard any differences between the court and defense

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[12] Indeed, Judge Bramwell was quite evenhanded in his direction to both sides to avoid repetitious questioning. Earlier in the trial defense counsel had objected to the Government's redirect of McCoullum as improper re-direct. Judge Bramwell had sustained the objection saying that the witness had already described the events and any further questioning on this point "would just be repetitious" (T. 106). Again, later on, Judge Bramwell interjected to tell Government counsel that the witness, Agent McElynn, had already answered the same question by counsel (T. 188).

counsel,[13] and when, during his final instructions, he advised the jury that the court itself had drawn no conclusion as to the merits of the case.[14] *See United States* v. *Cruz*, 455 F.2d 184 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972).

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[13] (T. 150-151):

The Court: Be seated, please. . . .

What I do wish to say to you, yesterday's session one of the attorneys and I had differences. You are here to judge the evidence as to the individual who is on trial, what you think of me or that attorney or of the prosecutor is not something that you should use in consideration. So if there is any difference between the Court and counsel, please don't use that as anything to be taken against the individual on trial.

Please try to feel that that is not part of what you are considering and consider the case only on the evidence and find either the innocence or guilt of this defendant only on the evidence which is properly before you.

We will now proceed.

[14] (T. 288-289).

The Court: . . .

Now, of course, I also said to you that during the trial the Court will be the judge on the law; likewise on motions that we had at side bar, you may recall, that was not for the purpose of keeping any of the proof from you but were matters of law that were discussed between the the attorneys and the Court itself and should not have come before you.

In any event, if you feel that you have discovered by stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now, that I have come to no conclusion in this case, nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendant. That is your province and your job. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates, they are advocating the best

[Footnote continued on following page]

Appellant was found guilty after a fair and impartial trial.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: August 1, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD THOMPSON, JR.,
Executive Assistant United States Attorney

PAUL B. BERGMAN,
Assistant United States Attorney,
*Of Counsel.**

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case they can for the party they represent, and they have a right to exercise as much forcefulness as they desire in their questioning or otherwise in presenting their case. I say this because this is within the framework of the ordinary trial. Of course, you know by this time that this case has come before you by way of an indictment presented by a Grand Jury. . . .

* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Laura A. Brevetti in the preparation of this brief. Ms. Brevetti is a third year law student at Georgetown University Law Center.

★ U. S. Government Printing Office 1975—614—353—129

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 1st day of August, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

LaRossa, Shargel & Fischetti, Esq.
522 Fifth Avenue
New York, N. Y. 10036

Evelyn Cohen

Sworn to before me this
1st day of August, 1975

Irene B. Cohen Bevilacqua

IRENE B. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0083965
Qualified in Kings County
Commission Expires March 30, 1977

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for _____

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Eastern District of New York

—Against—

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United States Attorney,
Attorney for _____
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